(4)

No. 98-536

In The

Supreme Court of the Uni

October Term, 1998

TOMMY OLMSTEAD, Commissioner of the Department of Human Resources of the State of Georgia, RONALD C. HOGAN, Superintendent of Georgia Regional Hospital/ Atlanta, and EARNESTINE PITTMAN, Executive Director of the Fulton County Regional Board,

Petitioners,

v.

L.C. and E.W., each by JONATHAN ZIMRING, as guardian ad litem and next friend,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONERS

JOHN C. JONES
Senior Assistant Attorney General
Counsel of Record for Petitioners

THURBERT E. BAKER
Attorney General

KATHLEEN M. PACIOUS
Deputy Attorney General

PATRICIA DOWNING
Senior Assistant Attorney General

JEFFERSON JAMES DAVIS
Special Assistant Attorney General

Counsel of Record:

JOHN C. JONES
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-5161

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18/2p

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

REPLY BRIEF OF PETITIONERS

I. The Eleventh Circuit's Decision Is Important.

The main point in the patients' responsive brief seems to be that this case really is not so important after all. For example, their very first argument is that the patients "did not claim as stated by Petitioners" that the Americans With Disabilities Act (ADA) required the provision of community-based treatment. (Resp. Brief, p. 1). Yet the patients sought and obtained an injunction under the ADA for exactly that result – community-based treatment. By the patients' own estimates, these placements cost over $70,000 annually for each patient. (*See* Plaintiffs' Brief On Remand, Ex. 2). Their argument that they did not claim they were entitled to this under the ADA defies logic.

Similarly, they also argue that the State officials "repeatedly misstate the court's holding as a finding that institutionalization constitutes 'discrimination *per se*' . . . and assert without basis that the decision grants a '*per se* right to community placement.' " (Resp. Brief, p. 4). In spite of the patients' attempt to understate the importance of this opinion, however, the record shows that the Eleventh Circuit's interpretation of the "integration mandate" is being wielded as a weapon throughout the country, both by patients and by the Department of Justice, to force deinstitutionalization. For example, one district court has ordered the discharge of as many as 256 patients from institutions to community placements, relying on this case and on *Helen L. v. DiDario*, 46 F. 3d 325 (3d Cir. 1995), *cert. denied*, 516 U.S. 813 (1995). *Kathleen S. v. Dept. of Public Welfare of Penn.*, 1998 U.S. Dist. LEXIS

11819, *1,*7 (E.D.Pa. 1998) (unreported). The Justice Department also is attempting to enforce the interpretation of the Eleventh Circuit as a *requirement on all states*. (Amicus Brief of the States of Florida, *et al.*, pp. 7, 1a to 27a). This requirement would apply not only in the delivery of services to mentally ill and mentally retarded persons, but also in connection with services in nursing homes.

The Eleventh Circuit's interpretation thus dramatically impacts not only Petitioners but all of the states. It has caused confusion about the validity of the State's entire services-delivery system, and it has created uncertainty about the continued viability of the State's institutions. The budgetary impact could be enormous. This Court should step in now and provide guidance on this important issue.

II. The Patients' Procedural Arguments Should Be Rejected.

The Respondents make two procedural arguments against the Court's considering this case. The Court should reject both arguments, concluding instead "that the interests of judicial administration will be served by addressing the issue on its merits." *Carlson v. Green*, 446 U.S. 14, 17 n. 2 (1980).

The patients first argue that review should be denied on the ground that the court of appeals' judgment is not final. Both the pertinent statute and this Court's cases, however, permit review of nonfinal judgments or proceedings. 28 U.S.C. § 1254(1) (1994); *The Conqueror*, 166 U.S. 110, 113-14 (1897); *see, e.g., United States v. General*

Motors Corp., 323 U.S. 373, 377 (1945) (review granted for case remanded by court of appeals for trial).

In the present case, the court of appeals affirmed the district court's judgment, and yet it also remanded the case for further proceedings. In practical effect, the court of appeals' decision is final, because it finally construes the ADA and the integration regulation. The only job left on remand is for the district court to adduce evidence on the fundamental-alteration issue. Nothing that the district court can do now will obviate, correct, or alter the legal error already committed by the court of appeals. This case is ripe for review.

The patients' second procedural argument is that one of the questions presented (the constitutional issue) was not raised adequately below. Initially, the State officials argued in the district court that the patients' position was clearly erroneous as a matter of statutory construction. Only when the district court agreed with the patients on the statute's meaning did the constitutional issue actually arise. That issue is whether, if the district court's construction of the statute is right, the statute violates the Constitution.

The State officials did raise this issue expressly in their briefs in the court of appeals, as the patients acknowledge. (Resp. Brief, pp. 6, A-2). The court of appeals certainly could have addressed that issue if it had wanted to do so, once it approved the district court's construction of the statute. In any event, this Court is not precluded from deciding issues that were not presented below. *See, e.g., Freytag v. Commissioner*, 501 U.S. 868

(1991); *Batson v. Kentucky*, 476 U.S. 79, 112-18 (1986); *Carlson, supra*; *Erie R.R. v. Tompkins*, 304 U.S. 64, 80-82 (1938). This issue is of sufficient importance to warrant review by this Court. Further, even if the Court declines review of the constitutional issue, the statutory issue alone should be reviewed.

III. The Patients' Argument That There Is No Conflict Among the Circuits Is Without Merit.

The patients' argument that there is no conflict among the circuits relies on their assertion that cases decided under the Rehabilitation Act are irrelevant to a claim under the ADA. (Resp. Brief, p. 8). This argument is easily answered.

This Court relied extensively on interpretations of § 504 of the Rehabilitation Act in a recent decision on the ADA. *Bragdon v. Abbott*, ___ U.S. ___, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998). Far from being irrelevant, the Court found that prior administrative and judicial interpretations of § 504 actually settled the meaning of the ADA. 118 S.Ct. at 2207-08, 141 L.Ed.2d at 559-562 (1998).

Further, the legislative history and administrative comments regarding Title II of the ADA repeatedly state that it closely followed § 504. *See, e.g.*, H.R.Rep. No. 101-485(III), 101st Cong., 2d Sess. 84 (1990) ("The Committee intends that title II work in the same manner as § 504"); 56 Fed.Reg. 33,694 (1991) ("Because Title II of the ADA essentially extends the nondiscrimination mandate of § 504 to those state and local governments that do not receive federal financial assistance, this rule hews closely

to the provisions of existing § 504 regulations"). The courts have uniformly applied cases on § 504 to the ADA. *See, e.g., Helen L., supra*, 46 F.3d at 330 n. 7 ("The law developed under § 504 of the Rehabilitation Act is applicable to Title II of the ADA"). For the patients to state that this law is "irrelevant" is without merit.

Additionally, the patients argue that the regulation was "simply applied" to the undisputed facts. (Resp. Brief, p. 11). They cite to isolated comments by the Attorney General and also to another version of the integration mandate[1] in support of this argument. Yet neither these comments nor the regulation even suggest, much less state plainly, that the integration mandate applies to services and programs that are provided *only* to individuals with disabilities.

IV. The Constitutional Question Merits Review

Finally, the patients have asserted that the constitutional question is not worthy of review. Two quick rejoinders apply here. First, even if the constitutional issue were not substantial, the statutory issue alone deserves review. Also, the patients' devoting more than half of their responsive argument to the constitutional issue belies their assertion that the issue is unimportant.

The bulk of the patients' constitutional argument is an attempt to distinguish the present case from *City of Boerne v. Flores*, 521 U.S. ___, ___, 117 S.Ct. 2157, 2159, 138

---

[1] The version of the integration mandate cited by the patients is not the one that was construed by the Eleventh Circuit. *See* Pet., 4a *et seq.*

L.Ed.2d 624, 638 (1997). *Flores* points out that, under Section 5 of the Fourteenth Amendment, "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern." The only reply necessary now is that the patients' argument not only fails to persuade on the merits but also, by its vigor, strongly supports the State officials' position that the constitutional question is a substantial one.

Another branch of the patients' constitutional argument is that the Commerce Clause can provide support if the Fourteenth Amendment fails as a foundation for Title II, the public-entities part of the ADA. The Clause cannot serve that function, however. First, the Eleventh Amendment bars all suits for damages against the States based on the Clause. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55-73 (1996). That the present suit seeks injunctive relief and pends against State officials rather than against the State itself does not change that rule here. The well-known exception under *Ex parte Young*, 209 U.S. 123 (1908), which authorized certain injunctive suits against state officials, does not permit suits for injunctions where the violations are not continuing and where state funds are to be used for redress of past wrongs. *Green v. Mansour*, 474 U.S. 64 (1985); *Edelman v. Jordan*, 415 U.S. 651 (1974). In the present case, the patients sought State-paid community placements – placements that the State provided and continues to provide.

Not only the Eleventh Amendment but also the Tenth Amendment may prevent the Commerce Clause from serving as a basis for Title II of the ADA. Of course, the

federal government may enforce, against the states, commercial regulations that are equally applicable to governmental and nongovernmental activities. *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985). Title II, however, applies expressly only to public entities, and it is sought to be enforced here by suit against State officials. In *New York v. United States*, 505 U.S. 144 (1992), this Court held that the Commerce Clause, being limited by the Tenth Amendment, provides no basis for Congress to order State governments to enact specific legislation or to take title to private property. In *Printz v. United States*, ___ U.S. ___, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), this Court held that, in light of the Amendment and other parts of the Constitution, the Clause does not permit Congress to require State or local executive officers to implement federal law. Thus, the Tenth Amendment may well bar the Commerce Clause's use as a foundation for Title II of the ADA.

Respectfully submitted,

THURBERT E. BAKER 033887
Attorney General

KATHLEEN M. PACIOUS 558555
Deputy Attorney General

JOHN C. JONES 401250
Senior Assistant
Attorney General

PATRICIA DOWNING 189150
Senior Assistant
Attorney General

JEFFERSON JAMES DAVIS 210650
Special Assistant
Attorney General

Please address all
communications to:

JOHN C. JONES
Senior Assistant Attorney General
40 Capitol Square, S. W.
Atlanta, GA 30334-1300
Telephone: (404) 656-5161